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No. 86-656

In the Supreme Court of the United States

OCTOBER TERM, 1987

RONALD W. REAGAN, ET AL., PETITIONERS

v.

JAMES ABOUREZK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

CITY OF NEW YORK, ET AL.

GEORGE P. SHULTZ, ET AL., PETITIONERS

v.

BRUCE CRONIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In our opening brief, we showed that Subsection 27 of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(27), authorizes the exclusion of aliens whose entry or presence in the United States may compromise our foreign policy. We also showed that nothing in the McGovern Amendment precludes the State Department fro n using Subsection 27 to exclude aliens for reasons which are in addition to – even if they are not independent of – the aliens' association with Subsection 28 (8 U.S.C. 1182(a)(28)) organizations. Respondents' opposing

statutory analysis on these two points is unpersuasive. And while respondents attempt to bolster their analysis by raising the specter of First Amendment issues, their constitutional arguments have been rejected by the unmistakably "clear and consistent" precedent of this Court (Pet. App. 60a (Bork, J., dissenting)).

A.

1. Respondents' principal attack on the State Department's resolution of the entry/presence issue is that it allegedly ignores the "plain meaning" (Br. 33) of the word "activities" in Subsection 27. To the contrary, however, the State Department's position is simply that, "[a]s in all cases of statutory construction, [the] task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve." *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979).

As respondents no longer dispute,[1] one of Congress's purposes in enacting Subsection 27 (and its predecessors) was to ensure the exclusion of aliens who might damage United States foreign policy. This purpose is served only if the statute's reference to "activities" is read to "encompass[] entry and presence as well" (Pet. App. 42a (Bork, J., dissenting)). To do otherwise in these cases would preclude the exclusion under Subsection 27 of aliens whose very admission into this country – because of their relationship with particular foreign regimes – could send an undesirable diplomatic message, and thus "have significant * * * foreign policy ramifications" (J.A. 57). A construction, like respondents', which would " 'strangle' " the

[1] In the lower courts, respondents contended that Subsection 27 does not authorize exclusion on the basis of foreign policy (as opposed to national security) concerns. The court of appeals (Pet. App. 15a), agreeing with the district court (*id.* at 73a-74a), found this to be a "counter-intuitive interpretation of expansive statutory language * * *."

purpose of the statute is highly suspect. See *Lynch* v. *Overholser*, 369 U.S. 705, 710 (1962) (quoting *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946)).[2] It does not distort the "plain meaning" of Subsection 27 to conclude that an alien's presence in or entry into the United States is an "activity" that may be prejudicial to the public interest. See 1 Op. Off. Legal Counsel 64, 71 n.10 (1977). Or, to put the matter another way, activities that would not be prejudicial to the public interest if conducted by other persons may nonetheless be prejudicial to the public interest if engaged in by a representative of a foreign power whose presence in the United States for that purpose is disadvantageous to the conduct of our government's foreign relations. Hence, the nature of the aliens' proposed "activity" in the present cases cannot meaningfully be distinguished from that involved in *El-Werfalli* v. *Smith*, 547 F. Supp. 152 (S.D.N.Y. 1982)—a case cited by respondents as a

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[2] Respondents claim (Br. 32-33) that this result may be tolerated because the President has other statutory provisions (besides Subsection 27) at his disposal for exclusion of aliens. Yet, as Judge Bork warned (Pet. App. 60a), if certain aliens may be excluded only by action of the President himself, with all the resonance in diplomatic intercourse that such action portends, then the Executive "will be deprived of much of the flexibility and nuance that are essential in the conduct of foreign relations."

Respondents also suggest (Br. 44) that granting visas to applicants such as those in these cases would not send misleading diplomatic signals if foreign governments were advised of the limited implications of visa decisions. Yet, as the district court found (Pet. App. 80a n.29), the foreign policy consequences of granting or denying a visa are a matter which "[n]either the Court nor plaintiffs are empowered" to judge. There is, at the very least, a potential for damaging confusion in respondents' suggested change in policy. Moreover, regardless of whether the *grant* of a visa would send a wrong message, the *denial* of a visa is an important diplomatic tool which the United States uses to "communicate its attitude about the policies of other states" (J.A. 58). Respondents would deprive the government of this tool.

model of the proper use of Subsection 27 (Br. 18, 31).[3] Nor do respondents dispute the validity of denying entry to "alien officials who engaged in physical brutality while in political power" (Br. 27), without regard to the particular activities in which those aliens seek to engage in the United States.

2. As discussed at length in our opening brief (at 20-22), the State Department's resolution of the entry/presence issue is also fully supported by the repeated references to "entry" and "presence" in the legislative history of Subsection 27 and its predecessors. Respondents seek to soften the force of this evidence by contending that "[i]n virtually every instance" (Br. 23) where Congress referred to entry and presence, it went on also to refer to the likelihood that the alien would engage in prejudicial activities.[4]

Respondents' guarded language implicitly concedes, however, that while certain portions of the legislative record do refer to activities as well as to presence or entry,

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[3] In *El-Werfalli*, the court upheld the government's use of Subsection 27 to exclude a Libyan national who sought to enter this country to study aircraft maintenance. 547 F. Supp. at 152-154. The "act of studying," however, involves no "misconduct" (see *id.* at 154); indeed, it does not necessarily involve *any* conduct other than listening to a teacher or reading a book. Respondents point to the prejudicial *consequences* in *El-Werfalli* of issuing a visa to the Libyan applicant there – namely, that the knowledge he acquired could later "serve the military forces of a hostile government" (Br. 31). And it was precisely to avoid prejudicial foreign policy consequences that the visa applications in the present cases were also denied.

[4] Respondents particularly rely (Br. 20) on the remarks of Senator McCarran in introducing the Internal Security Act of 1950. See 96 Cong. Rec. 14179 (1950). Those remarks, however, did not address the question here at issue. Senator McCarran simply observed that under then-existing practice, diplomats had been allowed to enter the United States even if they planned to engage in hostile "overt acts." *Ibid.* The fact that the 1950 Act would correct this problem does not demonstrate that the Act was unconcerned with aliens whose presence alone in the United States would compromise foreign policy.

other portions refer only to presence or entry and omit any discussion of the alien's other anticipated activities. See, *e.g.*, S. Rep. 1137, 82d Cong., 2d Sess. 27 (1952) (report accompanying the Immigration Act of 1952); 87 Cong. Rec. 4757 (1941) (remarks of Senator Russell, sponsor of the 1941 predecessor to Subsection 27).[5] More fundamentally, respondents' argument proves only that Congress used these terms interchangeably, and that its concern was not with subtle word distinctions, but with excluding aliens whose admission—for whatever reason—might be "prejudicial to the public interest, or endanger the welfare, safety, or security of the United States." 8 U.S.C. 1182(a)(27).[6]

3. Finally, respondents contend (Br. 23-30) that the Executive's resolution of the entry/presence issue is due no deference, both because *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), commits this issue to the judiciary and because the administrative practice on the issue has not been consistent. Neither contention has merit.

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[5] The short discussion in the Senate Report accompanying the 1941 statutory predecessor to Subsection 27 contains no mention of "activities." See S. Rep. 386, 77th Cong., 1st Sess. 1 (1941). In addition, the Report incorporates letters from the Attorney General and Acting Secretary of State describing the 1941 legislation. While the letter from the Attorney General mentions "activities," the letter from the State Department does not.

[6] Respondents also suggest that because various provisions of Section 1182(a) of the Immigration Act explicitly exclude aliens based on their status, but Subsection 27 does not, it should be inferred that Subsection 27 is only "conduct-based" (Br. 17). This argument ignores the fact that Subsection 27 is cast in terms far broader than those of any other exclusion provision. See Pet. App. 38a (Bork, J., dissenting) (the Immigration Act "mandates exclusion in thirty-two separate categories, while preserving in subsection (27), in the broadest of terms, the authority of the Executive to order additional ones"). Thus, while other categories may be targeted at only status or only conduct, there is no reason to assume that Subsection 27 is similarly limited.

a. The question in *Cardoza-Fonseca* was the "narrow" one of whether the standards of "well founded fear of persecution" and "clear probability of prosecution" in the Refugee Act of 1980 were identical. Slip op. 26. The Court rejected an administrative construction that they were.

Cardoza-Fonseca is inapposite, however, for two reasons. First, it appears that the Court there, using the "traditional tools of statutory construction," was led "inexorably to the conclusion" that congressional intent *was* clear and that the government was simply wrong in its interpretation. See slip op. 25-26, 27. This, of course, is entirely consistent with *Chevron U.S.A. Inc.* v. *Natural Resource Defense Council, Inc.*, 467 U.S. 837, 843 (1984), which said that courts are bound to honor the "unambiguously expressed intent of Congress." Conversely, nothing in *Cardoza-Fonseca* suggested that if Congress's intent had not been clear, deference to the administrative construction would not have been given. Indeed, in a post-*Cardoza-Fonseca* case concerning the meaning of "income" in the Aid to Families With Dependent Children statute, Congress's intent was unclear, and the Court's decision thus expressly hinged on principles of deference, as enunciated in *Chevron*, in upholding the administrative construction. *Lukhard* v. *Reed*, No. 85-1358 (Apr. 22, 1987), slip op. 9 (plurality opinion) ("the Secretary's interpretation of the AFDC statute * * * is entitled to deference"); *id.* at 1 (concurring opinion of Blackmun, J.) (resting on "the deference that is due the Secretary of Health and Human Services in his interpretation of the governing statutes"). See also, *e.g.*, *Bowen* v. *Yuckert*, No. 85-1409 (June 8, 1987), slip op. 12 n.8; *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 14. Here, we believe that the legislative evidence shows that Congress intended the word "activities" in Subsection 27 to reach entry and presence—or, in an alternative phrasing, to reach activities that are

objectionable only because of the entry or presence of the particular alien who seeks to engage in those activities. At a minimum, however, this evidence shows that there is no "unambiguously expressed intent" (*Chevron*, 467 U.S. at 843) to the contrary. Thus, to the extent the congressional intent is ambiguous, deference to the reasonable construction of the Executive is warranted—especially in this foreign policy context (see cases cited in Gov't Br. 23).[7]

Second, and more fundamentally, *Cardoza-Fonseca* involved a "pure" question of statutory construction—not what two provisions meant but whether they meant the same thing—while this case, like *Chevron*, involves the "quite different" question of how to apply and what "concrete meaning" to give to a statutory term. *Cardoza-Fonseca*, slip op. 24, 26. For the latter task, the Court in *Cardoza-Fonseca* made quite clear that "the courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program" (*ibid.*). Here there is no doubt that the " 'decision as to the meaning or reach of [the] statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected' " to the statute. *Chevron*, 467 U.S. at 844-845 (quoting *United States* v. *Shimer*, 367 U.S. 374, 382 (1961)).

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[7] *Japan Whaling Ass'n* v. *American Cetacean Society*, No. 85-954 (June 30, 1986), relied upon by respondents (Br. 24-25), is fully consistent with these principles. The question there concerned whether amendments to the Fishermen's Protective Act of 1967 required the Secretary of Commerce to certify that Japan's whaling practices "diminish the effectiveness" of an international convention for the protection of whales. The Court held that this question was not immune from judicial review under the political question doctrine simply because it touched on foreign relations. Slip op. 7-8. On the merits of the question, however, the Court deferred to the "reasonable construction" (*id.* at 19) advanced by the Secretary. See also *id.* at 11-12.

b. This entitlement to deference is not diminished by any inconsistency of administrative interpretation or practice. Respondents' claim of inconsistency is based primarily[8] on various decisions of the Board of Immigration Appeals (Br. 25-26). But the decisions cited are simply

[8] Respondents also claim (Br. 29 & n.26) that the government's position in these cases is inconsistent with State Department practice, as described in 1 Op. Off. Legal Counsel 64 (1977), as well as with a March 1, 1982 memorandum written by the Justice Department Office of Intelligence Policy and Review (J.A. 21-29). These claims are also without merit.

The Office of Legal Counsel opinion does note (1 Op. Off. Legal Counsel at 72) that between 1959 and 1962 certain memoranda and correspondence relating to a single alien questioned whether he could be excluded because of concerns sparked by his entry into this country. But the opinion goes on to observe that regardless of these documents, such concerns "have played a decisive role in the State Department's handling of cases over the years" (*ibid.*).

Similarly unavailing is respondents' reliance on the 1982 Justice Department memorandum. That memorandum had no occasion to address the entry/presence issue at all; moreover, it stated (J.A. 23) that Subsection 27 appeared to be a "direct descendant" of Presidential Proclamation No. 2523, 3 C.F.R. 270 (Supp. 1943)—a Proclamation which authorized the exclusion of any alien whose "*entry* would be prejudicial to the interests of the United States" (*id.* at 271 (emphasis added)). We note that the government has not, as respondents suggest (Br. 22 n.21), "abandoned" the position that Subsection 27 should be construed in light of that Proclamation. On the contrary, the above-mentioned Office of Legal Counsel opinion—which was expressly relied upon in our opening brief (at 24)—endorses the view that Subsection 27 was based upon the Proclamation (see 1 Op. Off. Legal Counsel at 68-69, 71).

See also 8 C.F.R. 175.47 (1941) (including a number of broad "[c]lasses of aliens whose entry is deemed to be prejudicial to the public interest" which were based on status or effect of admission rather than probable activities); 22 C.F.R. 58.47 (1943) (same); 8 C.F.R. 175.47 (1943) (same); 22 C.F.R. 58.53 (1945) (same); 8 C.F.R. 175.53 (1945) (same); 8 C.F.R. 175.53 (1947) (same); 22 C.F.R. 53.33 (1949) (same); 8 C.F.R. 175.53 (1949) (same).

irrelevant to the entry/presence issue. Each involved charges that the alien would engage in particular activities after entering the United States that would themselves be prejudicial to the public interest; the Board therefore was not called upon to consider whether foreign policy concerns raised by the alien's very entry or presence would justify exclusion under Subsection 27.

B.

Respondents make no real effort to address the arguments in our opening brief regarding the McGovern Amendment. They claim that the Amendment applies whenever the government seeks to exclude aliens "based on inferences drawn from their organizational memberships" (Br. 35) in proscribed organizations. In such cases, according to respondents, the government may process the aliens only under Subsection 28—not Subsection 27. But there is nothing in the language or history of the McGovern Amendment to require the government to blink at such inferences, and much to refute such a requirement, as we discussed at length in our opening brief (at 25-33).[9]

[9] The mischief inherent in the court of appeals' "independent of" requirement is illustrated by the recent decision in *Allende* v. *Shultz*, No. 83-3984-C (D. Mass. Mar. 31, 1987). That decision, which expressly relied on the panel decision in the present case in adopting that standard, concluded that the State Department has failed to meet that requirement and thereby to establish a facially legitimate and bona fide reason for refusing to waive a visa applicant's eligibility. It rejected the State Department's conclusion that—because of the applicant's membership in the Soviet-controlled World Peace Council and " 'the delicate relations between the United States and the USSR' " (slip op. 8)—her admission would prejudice United States' foreign policy interests and the visa could properly be denied. Instead, the court entered summary judgment against the State Department and held that plaintiffs were entitled to a declaration that the refusal to grant a visa was unauthorized.

Moreover, the McGovern Amendment makes clear on its face that no such blanket rule was intended, and that it is inapplicable to entire classes of aliens because of inferences to be drawn from their organizational membership. Most tellingly, in 1979 a provision was added to the Amendment declaring that it "does not apply to representatives of purported labor organizations"—even organizations that would otherwise come within Subsection 28—"in countries where such organizations are in fact instruments of a totalitarian state" (22 U.S.C. 2691(b)).[10] Such aliens are outside the ambit of the Amendment because their organizational membership demonstrates that "whatever else they may be" they are "representatives of the state." 125 Cong. Rec. 8345 (1979) (remarks of Rep. Solarz). As discussed in our opening brief (at 30-31), while the 1979 provision specifically mentions only labor leaders, its rationale is far broader. The sponsors of the provision stressed that it was designed to clarify that the McGovern Amendment, as enacted in 1977, was never intended to apply to representatives of foreign states or any other individual "who is excludable under present law." *Ibid.* And, as illustrated by the provision itself, such excludability may be inferred from the alien's organizational membership—whether or not the organization is covered by Subsection 28.

Respondents' suggestion that the government's construction is an "end run around the McGovern Amendment" (Br. 35) not only misses the import of the 1979 provision, it ignores other language in the Amendment as well. In unequivocal terms, 22 U.S.C. 2691(a) states that "[n]othing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludible for reasons other than membership

[10] See also 22 U.S.C. 2691(c) (excluding all members of the Palestine Liberation Organization from coverage by the McGovern Amendment).

in or affiliation with a proscribed organization." As our opening brief shows (at 26-27), this provision is fully applicable here. The aliens in these cases were excluded not because of their membership in Subsection 28 organizations per se, but because their membership in the particular organizations involved here demonstrates that they are affiliated with particular foreign governments and their entry would therefore jeopardize our foreign policy—a "separate ground" for exclusion (*Reid* v. *INS*, 420 U.S. 619, 623 (1975)) covered by Subsection 27.[11]

Accordingly, the visa denials here were entirely consistent with the limited purposes of the McGovern Amendment, even if that Amendment is regarded as imposing a judicially enforceable duty on the Secretary of State.[12]

[11] Respondents question (Br. 37 & n.32; see *id.* at 7 n.9) the government's conclusion that Ms. Finlay and Ms. Lezcano are affiliated with the Cuban government. In particular, they cite *In re Margaret Jo Randall*, No. A11 644 708 (Dep't of Justice, Exec. Off. for Immigr. Rev. Aug. 28, 1986), for the proposition that the Federation of Cuban Women (FMC)—in which both women are officials (see Pet. App. 89a)—is not linked with the Cuban government. Respondents' reliance on the *Randall* case is unwarranted. The conclusions reached by the Immigration Judge there regarding the FMC did not purport to reflect United States policy, but rather were based exclusively on the "evidence of record" (*Randall*, slip op. 25) submitted in that proceeding. That evidence included only the testimony of private individuals (see *id.* at 18, 25). Here, by contrast, the Under Secretary of State testified by affidavit (see Pet. App. 89a) that the FMC is an instrument of the Communist Party of Cuba. Insofar as respondents ask the courts to second-guess this judgment, they seek to initiate an inquiry that could not be "further outside the bounds of judicial competence, or more intrusive with respect to the conduct of foreign affairs" (Pet. App. 52a n.4 (Bork, J., dissenting)).

[12] As Judge Bork noted in dissent (Pet. App. 57a-58a), "it is at least an open question whether the terms of the McGovern Amendment are in fact mandatory." The statute itself says only that the Secretary "should" recommend that certain aliens have visa applications

C.

Respondents urge this Court to construe Subsection 27 narrowly so as to avoid First Amendment concerns that otherwise would be raised by the government's allegedly "content-based" (Br. 42) use of the statute in these cases.

The premise of respondents' argument is erroneous. As both Judge Greene and Judge Bork found in rejecting respondents' First Amendment claims (Pet. App. 80a): "Essentially, these applicants were not denied entry because of the content of the expected speeches, but because of their personal status as officials of governments or organizations which are hostile to the United States." Accord *id.* at 62a (Bork, J.) ("The government does not here enforce a policy of making decisions to exclude based on the content of applicants' political beliefs, but has instead chosen to exclude applicants who are members of or connected with particular foreign governments.").[13] Respondents concede these contrary findings

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approved, and there is much in the legislative history indicating that Congress did not intend the provision to be mandatory. See, *e.g.*, H.R. Conf. Rep. 95-1535, 95th Cong., 2d Sess. 44 (1978); 125 Cong. Rec. 10568 (1979) (remarks of Sens. Javits & McGovern); 125 Cong. Rec. 8347 (1979) (remarks of Reps. Fascell, Ashbrook & Solarz). On the other hand, as Judge Bork noted, the State Department has in the past expressed an interpretation of the McGovern Amendment that, together with some language in the legislative history, supports a mandatory reading. See Pet. App. 57a; see also page 29 of our opening brief (testimony of Mr. Horan). If the McGovern Amendment is not mandatory, then of course it cannot defeat the Secretary's exercise of discretion under Subsection 27 in this case. And, in any event, the precatory nature of the language used in the McGovern Amendment cautions against interpreting that Amendment to deprive the Secretary of discretion that Subsection 27 otherwise confers on him.

[13] Judge Bork also stated (Pet. App. 61a-62a) that, under *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), respondents could not prevail on their First Amendment claims even if the exclusions in these cases were based on the content of the applicants' political beliefs. The

below (Br. 45). Moreover, while it did not decide the First Amendment issue, the court of appeals made essentially the same finding. See Pet. App. 13a (the "dominant reason[]" cited by the State Department for these visa denials was "the continuing status of these aliens as members of organizations or governments hostile to the United States").

These findings reflect the long-standing position of the State Department. As Under Secretary Eagleburger averred, "It is neither the policy nor the purpose of the Department to use visa denials to control or restrict dialogue and debate concerning the policies of the United States or any other member of the world community" (J.A. 59). In the Under Secretary's knowledge, no application for a nonimmigrant visa "has been denied for reasons of foreign policy simply because the applicant was critical of our policies and objectives" (*ibid.*).

Contrary to respondents' suggestion (Br. 45-46), this policy was not abandoned in these cases. Rather, as even respondents acknowledge (Br. 3, 36), Mr. Pasti was excluded pursuant to an Administration policy, then in effect, to deny entry except in limited circumstances to *all* members of the World Peace Council involved in its role as an instrument of Soviet foreign policy (see Pet. App. 93a). Similarly, Ms. Finlay and Ms. Lezcano were excluded because they "intended to travel to the United States * * * as official representatives of the Cuban Government," and thus were subject to the general United States policy of "deny[ing] the entry of officials of the Cuban Communist Party or Government" (*id.* at 90a). And Mr. Borge was excluded because he "intended to travel to the United States *in his official capacity* as a high ranking member of a foreign government" whose foreign

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Court need not decide this question, however, because the exclusions were properly found by the district court to have been content-neutral.

policy goals are "directly opposed to those of the United States" (*id.* at 86a-87a (emphasis in original)).[14]

Given this record, then, there are no "First Amendment problems" (Resp. Br. 40) which the Court need skirt in resolving the statutory issues in these cases.[15] This Court has long since recognized that, although content-neutral restrictions on travel to or from foreign countries can always be said to lessen opportunities for the gathering and interchange of information, they are not for that reason constitutionally infirm. *Zemel* v. *Rusk*, 381 U.S. 1 (1965). And the Court specificially held in *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972), that the First Amendment rights of American citizens suffer no damage when the reason for visa denials is "facially legitimate and bona fide." The foreign policy concerns that form the basis for the denials here manifestly satisfy that test.[16] *Kleindienst* also makes clear that, where the State Department has articulated such valid reasons for a visa denial, it is inappropriate for the courts to "look behind" those reasons (*ibid.*). Accordingly, respondents have no plausible First Amendment claims.

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[14] Respondents are, therefore, making an irrelevant point when they cite (Br. 8 & n.12, 41) statements by government trial counsel that, assuming arguendo that a content-based exclusion were made, it would be permissible. In responding to this hypothetical question from the district court, counsel for the government stressed repeatedly that "nothing in the record" suggested that the exclusions here were based on the content of the applicants' political beliefs (see July 2, 1984 Tr. 57-59).

[15] Respondents cite a legion of cases involving alleged "content-based censorial judgments" (Br. 43). Those cases are all inapposite to the government's content-neutral exclusion decisions here.

[16] Since *Kleindienst* clearly controls respondents' First Amendment claims in this case, we continue to urge the Court to dispose of those claims without further remand (see Gov't Br. 36-37 n.19).

For these reasons and for those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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